SUPREME COURT, U. S.

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No. 594

In the

Supreme Court of the United States

OCTOBER TERM

FAYE S. FERGUSON,
Petitioner,

v.

JAMES WALTER FOUNTAIN,
Respondent.

PETITION FOR CERTIORARI

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FAYE S. FERGUSON,

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JAMES WALTER FOUNTAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Faye S. Ferguson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas in the above entitled cause on May 21, 1969, (Petitioner's Motion for Rehearing in said cause having been denied by the Supreme Court of Texas on June 18, 1969).

I. REPORT OF THE OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Texas, printed in Appendix A hereto, infra, Page 15, is reported in 441 S.W.2d 506. The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District in Amarillo, printed in Appendix B hereto, infra, Page 22, is reported in 437 S.W.2d 323.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Supreme Court of Texas was rendered and entered on May 21, 1969, Appendix A hereto, infra, Page 15.

2. The order denying petitioner's Motion for Rehearing by such Supreme Court was rendered and entered on June 18, 1969, Appendix C hereto, infra, Page 26.

3. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257.

III. QUESTIONS PRESENTED

1. Whether Petitioner has been denied due process and equal protection of the laws, as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States, by the Texas Supreme Court's holding that Rule 327 of the Texas Rules of Civil Procedure required Petitioner to produce a statement of facts of evidence adduced on trial of the case, even though undisputed jury misconduct was shown by transcript of the Statement

of Facts on Motion to Set Aside Verdict, transcript of pleadings, charge of the Court, and jury verdict.

2. Whether Rule 327 of the Texas Rules of Civil Procedure, requiring the entire record for appellate review, including statement of facts adduced on trial of the case, is unconstitutional by denying Petitioner due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, when undisputed reversible error has been established by Petitioner without presenting statement of facts adduced on trial of the case.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case are the Fifth and Fourteenth Amendments to the Constitution of the United States, reading as follows:

Fifth Amendment:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. STATEMENT

1. MATERIAL FACTS:

Petitioner, Faye S. Ferguson, sustained personal injuries in an automobile collision when her stopped vehicle was struck from the rear by a vehicle being driven by respondent.

Petitioner instituted this suit in the 140th District Court of Lubbock County, Texas, to recover her damages arising from such personal injuries, alleging that such collision was caused by specific acts of negligence by respondent. Respondent contended that he was confronted with a sudden emergency by the sudden and unexpected failure of the brakes on the vehicle he was driving.

In answer to special issues the jury found that James Walter Fountain failed to keep a proper lookout, but that such failure was not a proximate cause of the collision (Tr. 15); that Fountain failed to turn his vehicle in time to avoid the collision, but that such failure was not negligence (Tr. 17); that Fountain was confronted by a sudden emergency on the occasion in question, and that upon being confronted by such emergency he did what an ordinary prudent person would have done under the same or similar circumstances (Tr. 19). Petitioner's damages were set by the jury at the total amount o $6,476.62 (Tr. 20, 21).

Petitioner filed her Motion to Set Aside Jury Verdict and Grant Mistrial, alleging specific acts of misconduct on the part of the jury, and attached to such motion the affidavits of two of the jurors (Tr. 24-29).

After hearing uncontroverted testimony of three jurors on such motion, the trial court overruled the motion and

entered judgment against Petitioner and in favor of Respondent (Tr. 21-33). Petitioner timely filed her Motion for New Trial, alleging jury misconduct (Tr. 35-41), which was overruled by the trial court. (Tr. 42).

The Court of Civil Appeals held that the undisputed acts of misconduct complained of by petitioner caused probable harm to her, and that the accumulative effect of the acts of misconduct called for a reversal and required that the verdict be set aside, and reversed and remanded the case.

Petitioner presented for appellate review the Statement of Facts on Motion To Set Aside Jury Verdict, and a transcript of the pleadings, charge of the Court, and jury verdict.

The Supreme Court of the State of Texas reversed the judgment of the Court of Civil Appeals and affirmed the trial court's decision, on the basis that under Rule 327 of the Texas Rules of Civil Procedure, petitioner was required to file a statement of facts of the entire trial of the case, and that in failing to do so she failed to prove that the misconduct of the jury rather than the state of evidence probably caused the jury to answer the Special Issue adversely to her.

2. HOW FEDERAL QUESTIONS WERE PRESENTED IN THE STATE COURTS:

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the state courts as follows:

Petitioner first raised Federal questions in her Motion for Rehearing filed in the Supreme Court of Texas, by

bringing forward the following points of error in such Motion for Rehearing:

"VIII.

The Supreme Court has erred in reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court because respondent established as a matter of law that injury probably resulted to her by jury misconduct. This was accomplished by submitting to the Honorable Supreme Court the Statement of Facts on Motion to Set Aside Jury Verdict, transcript of pleadings, charge of the Court, and verdict of the jury. The reversal of the Court of Civil Appeals and affirmance of the judgment of the trial court was error on the part of the Supreme Court of the State of Texas and constituted a denial to respondent of due process of law as guaranteed to her by the Fifth Amendment to the Constitution of the United States of America, which provides as follows:

> "No person shall be - - - deprived of life, liberty or PROPERTY, WITHOUT DUE PROCESS OF LAW: - - -"
> (caps and underscore ours)."

"XIV.

The Supreme Court has erred in reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court because respondent established as a matter of law that injury probably resulted to her by jury misconduct. This was accomplished by submitting to the Honorable Supreme Court the Statement of Facts on Motion to Set Aside Jury Verdict, transcript of pleadings,

charge of the Court, and verdict of the jury. The reversal of the Court of Civil Appeals and affirmance of the judgment of the trial court was error on the part of the Supreme Court of the State of Texas and constituted a denial to respondent of due process of law and equal protection of the laws, as guaranteed to her by Section 1 of the Fourteenth Amendment to the Constition of the United States of America, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, WITHOUT DUE PROCESS OF LAW; nor deny to any person within its jurisdiction THE EQUAL PROTECTION of the laws."
> (caps and underscore ours)"

"XVI.

The Supreme Court has erred in holding that Rule 327 of the Texas Rules of Civil Procedure required respondent to produce a statement of facts of evidence adduced on trial of the case, even though undisputed jury misconduct was shown by transcript of the Statement of Facts on Motion to Set Aside Verdict, transcript of pleadings, charge of the Court, and jury verdict. The Supreme Court's holding that nevertheless Rule 327 was not sufficiently complied with constituted an arbitrary interpretation of Rule 327 of the Texas Rules of Civil Procedure and denied to respondent due process and equal protection of the laws

as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

"XVII.

The Supreme Court has erred in holding that Rule 327 of the Texas Rules of Civil Procedure required respondent to produce a statement of facts of evidence adduced on trial of the case, in the face of respondent's having established undisputed jury misconduct and reversible error by the foreman of the jury disregarding the Court's instructions and stating to the jury at least twice, and probably more, that every man was innocent until proved guilty beyond a shadow of a doubt, and further stating to the jury that it was immaterial how Special Issue No. 1(b) was answered because respondent would get the money already awarded to her by the jury in the damage issues. The Supreme Court's holding, that nevertheless Rule 327 was not sufficiently complied with because respondent did not present a statement of facts adduced on trial of the case, is arbitrary, unreasonable and unconstitutional, and denies to respondent equal protection and due process of law as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

"XVIII.

The Supreme Court has erred in reversing the Court of Civil Appeals and affirming the trial court judgment by

virtue of Rule 327 of the Texas Rules of Civil Procedure because the provisions of such Rule requiring the entire record, including statement of facts adduced on trial of the case, when undisputed reversible error has been established by respondent without presenting statement of facts adduced on trial of the case, renders such Rule 327 unconstitutional, unreasonable, arbitrary and void, and denies to respondent due process and equal protection of the laws as guaranteed to her by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

The Supreme Court of Texas refused and denied peitioner's Motion for Rehearing without written opinion.

VI. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the Texas Supreme Court has the effect of denying Petitioner the right of appellate review, guaranteed to her by the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the Federal Constitution, for the sole reason of failure to include in the appellate record a statement of facts of evidence presented on trial, even though jury misconduct and the harmful effect thereof has been indisputably and conclusively shown by the record actually presented for review. Such holding therefore is unconstitutional because it constitutes denial of due process and equal protection of the laws.

2. The Texas Supreme Court's decision in this case has the effect of holding that the undisputed and conclusive

evidence of jury misconduct established by Petitioner by the transcript of Statement of Facts on hearing of Motion to Set Aside Jury Verdict, will not be considered by the Texas courts without Petitioner also being required to bring up the whole record. Under the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, Petitioner is entitled to a JUDICIAL EXAMINATION of every issue that, according to established procedure, may affect the attainment of a legal trial. The jury's violations of the Court's charge and its undisputed acts of misconduct clearly affected the attainment of a legal trial, and the due process and equal protection provisions require that Petitioner be accorded judicial examination and appellate review of such jury misconduct. The record on appeal presented by Petitioner is sufficient for the appellate courts to make such judicial examination, without the necessity of the whole record of the evidence adduced on trial of the case, and the denial of such right of review constitutes denial of due process and equal protection of the laws.

3 The Texas Supreme Court by its holding herein, disregarded previous holdings of the courts of our state respecting the guarantees of due process and equal protection in the Fifth and Fourteenth Amendments to the Constitution of the United States.

Vogt vs. Bexar County, 23 S.W. 1044, held as early as 1893 that as applied to procedure, due process requires a fair and impartial trial before a competent tribunal.

The right to a hearing, as guaranteed by due process, requires a JUDICIAL EXAMINATION of every issue that, according to established procedure, may affect the attainment of a legal trial. This was held by another early

case, Freeman vs. Ortiz, 153 S.W. 304, in 1913. Established procedure in our case was contained in the Court's charge, which the jury disregarded.

Due process of law includes both procedural protection and substantive protection. City of New Braunfels vs. Waldschmit, 207 S.W. 303. Houston & Tex. Cent. Ry. Co. v. Dallas, 84 S.W. 648.

Of course the guarantee of due process does not unduly restrain the State in the exercise of legislative police powers, but even the great and powerful police powers of the State of Texas cannot be arbitrary, unreasonable, nor beyond the necessities of the case. Rule 327, and its interpretation by the Texas Supreme Court in this case, appears to petitioner to be unreasonable, arbitrary and beyond the necessities of the case. See Spann vs. City of Dallas, 235 S.W. 513; Houston & Tex. Cent. Ry. Co. vs. Dallas, 84 S.W. 648; American Federation of Labor vs. Mann, 188 S.W. 2d 276.

"Due process of law" entitles a litigant to appellate review. The right to appellate review is as valuable and fundamental as the right to be heard in the trial court. Corsicana Hotel Co. of Texas vs. Kell, 66 S.W. 2d 760; Burrage vs. Hunt Production Co., 114 S.W. 2d 1228. Rule 327, and the Texas Supreme Court's interpretation thereof, and its strict application to this case denies to petitioner this fundamental right of appellate review.

Under the due process clauses of both State and Federal Constitutions, a litigant is entitled to appellate review. Board of Firemen's Relief and Retirement Fund Trustees of Texarkana vs. Hamilton, 386 S.W. 2d 754.

The Texas legislature is restricted in its powers by the

Fifth and Fourteenth Amendments to the United States Constitution, and by Subsection 19 of Article 1 of the Texas Constitution. Mellinger vs. City of Houston, 3 S.W. 249. Since the legislature can not deny a litigant due process, neither can Rule 327, nor the Texas Supreme Court by an interpretation of it.

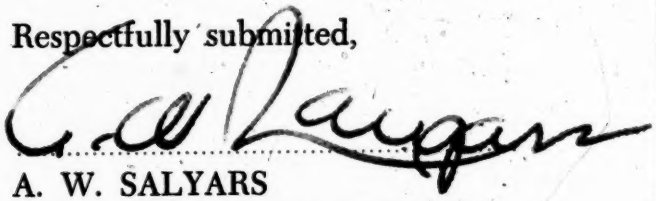
The "record as a whole" provision in Rule 327 was not contained in its source, Article 2234. It has not been tested as to its deprivation of due process. The harm is clearly demonstrated in this case. The cases are virtually unanimous that under Rule 327 the question of fact is whether or not misconduct occurred. Whether it had injurious effect is a question of law. The trial court's overruling of respondent's Motion to Set Aside Jury Verdict did not in this case have the effect of finding that no misconduct occurred because when misconduct is undisputed such presumption of no misconduct by the Court's ruling does not obtain. Rodman Supply Co. v. Jones, 370 S.W. 2d 951. The sole remaining question was whether or not the misconduct caused probable harm. The Court of Civil Appeals said yes, the Texas Supreme Court has in effect refused to pass on it, and affirmed the trial court, because of the "record as a whole" clause in Rule 327. This denies appellate review and therefore due process.

Petitioner was entitled to new trial by reason of the jury misconduct for the further reason that her trial was "materially unfair". The appellate courts strive to insure fair trials in trial court. Rule 327, and the Texas Supreme Court's interpretation thereof in this case, has the reverse effect and denies a fair trial. See In Re Northcutt's Estate, 340 S.W. 2d 510.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Opinion of the Court Below

IN THE SUPREME COURT OF TEXAS

No. B-1349

JAMES WALTER FOUNTAIN, Petitioner,

v.

FAYE S. FERGUSON, Respondent.

From Lubbock County,

Seventh District.

This appeal presents questions concerning jury misconduct. Faye S. Ferguson sued James Walter Fountain, a minor, and his father for personal injuries which she sustained when James Walter Fountain drove a vehicle into the rear of her vehicle. Fountain's defense was that he was confronted by an emergency when the brakes on his vehicle suddenly and unexpectedly failed. The trial court sustained a motion for instructed verdict for the defendant father, and rendered a judgment on a jury verdict that plaintiff take nothing as to James Walter Fountain. Plaintiff moved for a new trial grounded upon jury misconduct, but the trial court overruled her motion. She then appealed to the court of civil appeals without bringing forward a statement of facts. That court reversed the trial court judgment because of the jury misconduct about which plaintiff complained. 437 S.W.2d 323. We

reverse the judgment of the court of civil appeals because the plaintiff did not sustain her burden to prove material misconduct which, from the record as a whole, probably resulted in harm. Rule 327, T.R.C.P.

The answers to the special issues show the jury (1) found James Walter Fountain failed to keep a proper lookout, (2) refushed to find that the failure to keep a proper lookout was a proximate cause of the collision, (3) refused to find that Fountain was driving at an excessive rate of speed, (4) found Fountain failed to turn his vehicle to avoid the collision, (5) but such failure was not negligence, (6) refused to find that Fountain drove his vehicle too closely behind the vehicle in which plaintiff was riding, (7) found that, on the occasion in question, Fountain was confronted by a sudden emergency, (8) and he did what an ordinary prudent person would have done under the same or similar circumstances. The jury further found that plaintiff sustained damages in the sum of $6,476.62.

Plaintiff filed a motion for new trial in which she complained of jury misconduct. At the misconduct hearing, plaintiff presented three jurors who testified about three forms of jury misconduct. There was evidence that the foreman, on two occasions, said that every man was innocent until proved guilty beyond a shadow of a doubt, and that he also told other jurors that the answers to the first two issues, stated above, were immaterial in view of the answers to the damage issues. Another juror made the statement that she once had the experience of her brakes failing and that she could understand how it could have happened to Fountain.

The one complaining about jury misconduct has the burden to prove the overt act of misconduct, that it was

material misconduct, and "from the record as a whole that injury probably resulted." Rule 327, T.R.C.P.; Crawford v. Detering Co., 150 Tex. 140, 237 S.W.2d 615 (1951); White Cabs v. Moore, 146 Tex. 101, 203 S.W.2d 200 (1947). In oue opinion plaintiff did not discharge its burden to prove probable harm.

The trial court's order overruling the motion for new trial impliedly found that misconduct did not occur, since it contained no express finding of misconduct. Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S.W.2d 770 (Com. App. 1932); St. Louis B. & M. R. Co. v. Cole, 14 S.W.2d 1024, reh. den. 16 S.W.2d 534 (Com. App. 1924). Plaintiff, however, says that findings of misconduct, whether express or implied, are not binding on the reviewing courts when all of the uncontroverted evidence is that the misconduct occurred. State v. Wair, 171 Tex. 69, 351 S.W.2d 878 (1961); Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943). The court of civil appeals sustained plaintiff's contention that the uncontradicted evidence showed the fact of misconduct. That court did not discuss the materiality of the misconduct or its probable harm, but concluded that harm resulted.

The point in time during jury deliberations at which misconduct occurs is an important factor in determining the probability of injury. Baird's Bread Co. v. Hearn, 157 Tex. 159, 300 S.W.2d 646 (1957); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (19444). As stated by the court of civil appeals, and as revealed by the undisputed evidence taken during the misconduct hearing, the alleged misconduct occurred after the jurors had answered all but the first two issues. The jurors testified that they began answering the special issues, but passed over the first two concerning lookout and then answered

all of the rest of them in sequence. The jurors then returned to a consideration of the lookout issues after they answered issues exonerating Fountain on the other alleged acts of negligence and after finding he had acted in a sudden emergency as an ordinary prudent person whold have acted. When the jurors were reconsidering and again discussing the lookout issues, the alleged acts of misconduct occurred. The jurors then found that Fountain failed to keep a proper lookout, but refushed to find that his failure to keep a proper lookout was a proximate cause of the collision. Plaintiff says the misconduct probably caused the jurors to answer the proximate cause issue adversely to her. She says a favorable answer would have created a conflict between the lookout findings and the emergency findings.

It is not necessary for us to determine whether a conflict in findings would exist as plaintiff contends, since plaintiff failed to prove that misconduct of the jury probably caused the adverse answer to the proximate cause issue. The record which plaintiff has brought forward consists only of the transcript and the record of the testimony developed at the misconduct hearing. The statement of facts on the main trial is not before us. Rule 327 expressly fixes the burden upon the one complaining of misconduct to prove that "it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted . . ." Ross v. Texas Employers' Ins. Ass'n, 153 Tex. 276, 267 S.W.2d 541 (1954); Calvert, The Development of the Doctrine of Harmless Error in Texas, 31 Tex. L. Rev. 1 (1952).

The term "record as a whole" has been broadly construed to include "any and all parts of the record which may

throw light on the question of injury." Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943); Cole v. Waite, 151 Tex. 175, 246 S.W.2d 849 (1952); Akers v. Epperson, 141 Tex. 189, 171 S.W.2d 483, 156 A.L.R. 1028 (1943). The term includes matters disclosed by the evidence heard on the main trial as well as the motion for new trial. Motley v. Mielsch, 145 Tex. 557, 200 S.W.2d 622 (1947); Prudential Fire Ins. Co. v. United Gas Corporation, 145 Tex. 257, 199 S.W.2d 767 (1946). A consideration of the state of the evidence on the main trial has been sustained as a basis for treating jury misconduct as immaterial. Western Textile Products Co. of Texas v. Sidran, 153 Tex. 21, 262 S.W.2d 942 (1953). The effect of misconduct by one juror has been weighed against the evidence heard during the main trial in arriving at the conclusion that jury misconduct was harmless. Tudor v. Tudor, 311 S.W.2d 733, error ref. 158 Tex. 559, 314 S.W.2d 793.

The extent to which this court has gone in passing upon the law question of probable injury is even more fully illustrated by our comments about probable injury under Rules 434 and 503 in Aultman v. Dallas Railway & Terminal Co., 152 Tex. 509, 260 S.W. 596 (1953) and enlarged upon in Lumberman's Lloyds v. Loper, 153 Tex. 404, 269 S.W.2d 367 (1954). In the latter case we said:

> "* * * The 'whole record' clearly includes the statement of facts, and there is small point in looking to the latter, if we are to ignore the most essential thing which it discloses, to-wit, the state of the evidence. If the evidence is such that we believe that the jury would in all probability have rendered the same verdict that was rendered here, whatever the argument of the defendant's counsel or lack of it, how

can we logically say that the argument probably caused the rendition of an improper judgment based on that verdict? It is true that the rule in question cannot in every type of case be given the broad application which its words literally invoke. For example, in a case of an incorrect submission to the jury, we could hardly by-pass the error by making, in a sense, a decision on the weight of the evidence. Even in improper argument cases, we should doubtless consider the state of the evidence whith much caution. But, with some slight apology to consistency, we think tha tin argument cases we may; properly reason, as we do in this case, that since the evidence so preponderated in favor of the finding that the alleged accident did not occur, and since the worst of the offending argument had no direct reference to that specific mattter, the argument probably did not cause the verdict and judgment to be as they were."

In evaluating probable harm, this court has held that the preponderance of the evidence may be considered. Houseman v. De Cuir, 155 Tex. 127, 283 S.W.2d 732 (1955). When the state of the evidence from the record as a whole showed that the facts overwhelmingly favored the appellee, misconduct was held harmless. Walker v. Texas Employers' Ins. Ass'n, 155 Tex. 617, 291 S.W.2d 298 (1956). The rule was announced in City of Galveston v. Hill, 151 Tex. 139, 246 S.W.2d 860 (1952) that only such portions of a statement of facts as can have no bearing on harm, should be omitted by one who has the burden to establish harm. The complaint in that case was that the injection of insurance into a personal injury suit injured the plaintiff.

We conclude that the plaintiff in failing to bring forward the statement of facts failed to prove that the misconduct

of the jury rather than the state of evidence probably caused the jury to answer the special issue adversely to plaintiff. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

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Jack Pope
Associate Justice

Opinion delivered May 21, 1969

APPENDIX B

Opinion of the Court Below

COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

No. 7886

FAYE S. FERGUSON, Appellant

vs.

JAMES WALTER FOUNTAIN, ET AL, Appellees

November 25, 1968

This is a suit by Faye S. Ferguson against James Walter Fountain, a minor, and W. J. Fountain for personal injuries sustained as a result of an automobile collision. The trial court entered judgment for the defendants on the jury verdict. All of appellant's points of error relate to jury misconduct.

This suit involves alleged personal injuries sustained by the plaintiff in an automobile collision in the Cty of Lubbock when her stopped vehicle was struck from the rear by a vehicle being driven by James Walter Fountain and owned by W. J. Fountain. In response to the special issues submitted, the jury found: (1A) the defendant failed to keep a proper lookout; (1B) that such failure was not a proximate cause; (2A) the defendant was not driving at an excessive speed; (3A) the defendant failed to turn his

vehicle in time to avoid the collision; (3B) that such failure was not negligence; (4A) that the defendant was not following too closely behind plaintiff's vehicle; (5) that the defendant was confronted with a sudden emergency; (6) that the defendant did what an ordinary, prudent person whould have done under the same or similar circumstances; and awarded plaintiff $6,476.62 total damages.

Whether or not jury misconduct occurred is a question of fact, but whether or not injury probably resulted therefrom is a question of law to be determined by the appellate court. City of Houston vs. Quinoines 142 Tex 282; 177 S.W.2d 259. Texas Employers Insurance Association vs. Waldon (Tex. Civ. App.) 392 S.W.2d 509 (Ref. N.R.E.). Western Cottonoil Company vs. Arnold (Tex. Civ. App.) 279 S.W.2d 374.

A hearing on the plaintiff's motion to set aside the jury verdict and grant a new trial was held before the court. Three jurors testified at the hearing. While t he testimony of the three jurors was not identical in the manner in which they expressed themselves, they uniformally testified the first two special issues, relating to the defendant's lookout and proximate cause were not answered until the remaining issues, including damages, were answered. Upon returning to the consideration of these first two issues, all three jurors testified the foreman informed the jury, as one juror stated it: "That every man was innocent until proven guilty beyond a shadow of a doubt". All agreed the foreman made this statement at least two times and perhaps more. Each of the three jurors also stated the foreman informed them it was immaterial how they answered the negligence issues as the plaintiff would receive the amount of damages the jury had already assessed. This statement

was made on one occasion in response to a statement of Juror Kutch: "Why should we continue to waste time if we are going to find the defendant . . . there was no negligence on the part of the defendant. At which time I was assured by the foreman of the jury that this made no difference as to what damages would be awarded." After this statement by the foreman, the jury proceeded to answer the proximate cause issue in the negative.

We are of the opinion the statement by the jury foreman that it was immaterial how the negligence issues were answered as the plaintiff would recover the amount of damages the jury had assessed, constituted misconduct. Numerous cases have held this character of overt act constituted jury misconduct. Trousdale vs. Texas & New Orleans Railroad Company 154 Tex 231; 276 S.W.2d 242. Thompson vs. Copeland (Tex. Civ. App.) 289 S.W.2d 312 (Ref. N.R.E.). Pryor vs. New St. Anthony Hotel Company (Tex. Civ. App.) 146 S.W.2d 428 (Writ Ref.). Kimble vs. Younger Brothers (Tex. Civ. App.) 283 S.W.2d 254 (Ref. N.R.E.). Barclay vs. Montgomery-Ward & Company (Tex. Civ. App.) 269 S.W.2d 445 (Ref. N.RE.). Heflin vs. Fort Worth & D. C. Ry. Co. (Tex. Civ. App.) 207 S.W.2d 114 (Ref. N.R.E.).

The foreman's statement relating to the materality of certain jury findings was made after the damage issues had been answered. The proximate cause issue referred to had not been answered after two lengthy discussions. The jury had "passed over" the issues because of their inability to agree, and had come to it again only after answering the other issues. The three jurors who testified all argreed the foreman made the statement at least two times and that the statement led them to agree to vote as they did on the negligence and proximate cause issues. We think these

acts of misconduct caused probable harm to the plaintiff. Although it is not in itself persuasive, a statement by Juror Simpson: "It was the desire of the jury . . . . I don't believe there was anyone who wanted to do otherwise . . . to award Mrs. Ferguson something", strengthens the conclusion the jurors were influenced in their vote by the statements of the foreman.

It is also uncontradicted the foreman informed the jury a person "is innocent until found guilty beyond a reasonable doubt", as stated by one juror; or "beyond a shadow of a doubt", as stated by another during a discussion of the negligence issues. As one juror stated in his affidavit: "Most of the jury voted the way they did because they didn't want to make a criminal of the defendant". The above erroneous statement, clearly contrary to the court's instructions, was an overt act of jury misconduct. Another juror told of her personal experience when she "mentioned that her brakes had failed before and she could understand how this could have happened to the boy". The accumulative effect of the acts of misconduct call for a reversal and require that the verdict be set aside. Parris vs. Jackson (Tex. Civ. App.) 338 S.W.2d 280. Gonzalez vs. Broussard (Tex. Civ. App.) 274 S.W.2d 737 (Ref. N.R.E.). Scoggins vs. Curtiss & Taylor 148 Tex 15; 219 S.W.2d 451.

The judgment o the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

James G. Denton, Chief Justice

APPENDIX C

No. B-1349

In the
SUPREME COURT OF TEXAS

JAMES WALTER FOUNTAIN
v.
FAYE S. FERGUSON

Austin, Texas, June 18, 1969.

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B-1349,

JAMES WALTER FOUNTAIN ET AL VS. FAYE S. FERGUSON was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk